

Department of Energy

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actions to negate or reduce FOCI to acceptable levels. The plan of action may vary with the type of foreign interest involved, degree of ownership, and information involved so that each plan must be negotiated on a case by case basis. If the offeror(s) or contractor and the DOE cannot negotiate a plan of action that isolates the offeror(s) or contractor from FOCI satisfactory to the DOE, then the offeror(s) shall not be considered for contract award and affected existing contracts with a contractor shall be terminated.

[49 FR 11941, Mar. 28, 1984, as amended at 59 FR 9104, Feb. 25, 1994]

Subpart 904.71—Prohibition on Contracting (National Security Program Contracts)

SOURCE: 58 FR 59684, Nov. 10, 1993, unless otherwise noted.

904.7100 Scope of subpart.

This subpart implements section 836 of the Fiscal Year 1993 Defense Authorization Act (Pub. L. 102-484) which prohibits the award of a Department of Energy contract under the national security program to an entity controlled by a foreign government if it is necessary for that entity to be given access to information in a proscribed category of information in order to perform the contract.

[58 FR 59684, Nov. 10, 1993, as amended at 67 FR 14876, Mar. 28, 2002]

904.7101 Definitions.

Effectively owned or controlled means that a foreign government or an entity controlled by a foreign government has the power, either directly or indirectly, whether exercised or exercisable, to control or influence the election or appointment of the Offeror's officers, directors, partners, regents, trustees, or a majority of the Offeror's board of directors by any means, e.g., ownership, contract, or operation of law.

Entity controlled by a foreign government means any domestic or foreign organization or corporation that is effectively owned or controlled by a foreign government or any individual acting on behalf of a foreign government. See 925.7 for a statement of the prohibition.

Foreign government means any governing body organized and existing under the laws of any country other than the United States and its possessions and trust territories and any agent or instrumentality of that government.

Proscribed information means—

- (1) Top Secret information;
- (2) Communications Security (COMSEC) information, except classified keys used to operate secure telephone units (STU IIIs);
- (3) Restricted Data, as defined in the Atomic Energy Act of 1954, as amended;
- (4) Special Access Program (SAP) information; or,
- (5) Sensitive Compartmented Information (SCI).

904.7102 Waiver by the Secretary.

(a) 10 U.S.C. 2536(b)(1)(A) allows the Secretary of Energy to waive the prohibition on the award of contracts set forth in 10 U.S.C. 2536(a) if the Secretary determines that a waiver is essential to the national security interests of the United States. Any request for a waiver regarding award of a contract or execution of a novation agreement shall address:

- (1) Identification of the proposed awardee and description of the control by a foreign government;
- (2) Description of the procurement and performance requirements;
- (3) Description of why a waiver is essential to the national security interests of the United States;
- (4) The availability of other entities to perform the work; and
- (5) A description of alternate means available to satisfy the requirement.

(b) 10 U.S.C. 2536(b)(1)(B) allows the Secretary of Energy to waive the prohibition on the award of contracts set forth in 10 U.S.C. 2536(a) for environmental restoration, remediation or waste management contracts at a DOE facility if the Secretary determines that a waiver will advance the environmental restoration, remediation or waste management objectives of DOE; will not harm the national security interests of the United States; and may be authorized because the entity to which the contract is to be awarded is controlled by a foreign government

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with which the Secretary is authorized to exchange Restricted Data under Section 144.c. of the Atomic Energy Act of 1954 (42 U.S.C. 2164(c)). Any request for such a waiver regarding award of a contract or execution of a novation agreement shall address:

(1) Identification of the proposed awardee and description of the control by a foreign government;

(2) Description of the procurement and performance requirements;

(3) A description of how the Department's environmental restoration, remediation, or waste management objectives will be advanced;

(4) A description of why a waiver will not harm the national security interests of the United States;

(5) The availability of other entities to perform the work;

(6) A description of alternate means available to satisfy the requirement; and

(7) Evidence that the entity to which a contract is to be awarded is controlled by a foreign government with which the Secretary is authorized to exchange Restricted Data under Section 144.c. of the Atomic Energy Act of 1954 (42 U.S.C. 2164(c)).

(c) Any request for a waiver under paragraph (a) or (b) of this section shall be forwarded by the Head of the Contracting Activity to the Office of Contract Management within the Headquarters procurement organization.

(d) If the Secretary decides to grant a waiver for an environmental restoration, remediation, or waste management contract, the Secretary shall notify Congress of this decision. The contract may be awarded or the novation agreement executed only after the end of the 45-day period beginning on the date notification is received by the Senate Committee on Armed Services and the House Committee on National Security.

(e) Any request for a waiver under this subpart shall be accompanied by the information required by DEAR 952.204-73 that has been developed by

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the Safeguards and Security Lead Responsible Office at the contracting activity.

[67 FR 14876, Mar. 28, 2002]

904.7103 Solicitation provision and contract clause.

(a) Any solicitation, including those under simplified acquisition procedures, for a contract under the national security program which will require access to proscribed information shall include the provision at 48 CFR 952.204-73.

(b) Any contract, including those awarded under simplified acquisition procedures, under the national security program which require access to proscribed information to enable performance, shall include the clause at 48 CFR 952.204-2.

[58 FR 59684, Nov. 10, 1993, as amended at 61 FR 21976, May 13, 1996; 62 FR 42074, Aug. 5, 1997; 67 FR 14877, Mar. 28, 2002]

Subpart 904.72—Public Affairs

SOURCE: 65 FR 81006, Dec. 22, 2000, unless otherwise noted.

904.7200 Purpose.

It is the policy of the Department of Energy to provide to the public and the news media, accurate and timely unclassified information on Departmental policies, programs, and activities. The Department's contractors share the responsibility for releasing unclassified information related to efforts under their contracts and must coordinate the release of unclassified information with the cognizant contracting officer and appropriate DOE Public Affairs personnel.

904.7201 Contract clause.

The contracting officer shall insert the clause at 952.204-75 in solicitations and contracts that require the contractor to release unclassified information related to efforts under its contract regarding DOE policies, programs, and activities.